TD 2001/23 - Income tax: Is salary paid to an Italian resident employed as an assistant teacher in an Australian school exempt income?

This cover sheet is provided for information only. It does not form part of *TD 2001/23 - Income tax: Is salary paid to an Italian resident employed as an assistant teacher in an Australian school exempt income?*

This determination contains references to repealed provisions, some of which may have been re-enacted or remade. The determination has effect in relation to the re-enacted or remade provisions. Paragraph 32 in TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten.
Australia's tax treaties and other agreements except for the Taipei Agreement are set out in the Australian Treaty Series. The citation for each is in a note to the applicable defined term in sections 3AAA or 3AAB of the International Tax Agreements Act 1953.

Taxation Determination

Income tax: Is salary paid to an Italian resident employed as an assistant teacher in an Australian school exempt income?

Preamble

The number, subject heading, date of effect and paragraphs 1 to 5 of this Taxation Determination are a 'public ruling' for the purposes of Part IVAAA of the ***Taxation Administration Act 1953*** *and are legally binding on the Commissioner. The remainder of the Determination is administratively binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain how a Determination is legally or administratively binding.*

Date of Effect

This Determination applies to years commencing both before and after its date of issue. However, this Determination does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

1. Yes, the salary is exempt income in Australia if all of the requirements of Article 20 of Schedule 21 (the Italian Agreement) to the *International Tax Agreements Act 1953* are met.

2. If the salary is exempt income, subsection 12-1(1) of Schedule 1 of the *Taxation Administration Act 1953* says that the employer is not required to withhold an amount of tax.

3. Some Australian schools employ residents of Italy to assist in the teaching of the Italian language. The position in the school that the resident of Italy will hold may be described as assistant teacher or language assistant. Invariably there will be a class teacher who holds Australian teaching qualifications and the assistant teacher will work closely with and under the directions of that class teacher. While the assistant teacher may not have the full range of professional responsibilities that a class teacher will have, the assistant teacher is recognised by teachers, parents and students as teaching within the school.

4. Article 20 of Schedule 21 to the *International Tax Agreements Act 1953* says:

> *A professor or teacher who visits one of the Contracting States for a period not exceeding two years for the purpose of teaching or carrying out advanced study or research at a university, college, school or other educational institution in that State and who immediately before that visit was a resident of the other Contracting State shall be exempt from tax in the first-mentioned State on any remuneration for such teaching, advanced study or research in respect of which he is, or upon the application of this Article will be, subject to tax in the other State.*

5. To obtain the 'visiting teacher' exemption from Australian income tax, the assistant teacher must satisfy the following requirements:

- Be a teacher in Italy. This is a question of fact. If a person was employed as a teacher in Italy or had recently qualified to be employed as a teacher immediately prior to coming to Australia, we accept that the person is a teacher in Italy. If a person who is qualified to be a teacher in Italy had ceased to be teacher sometime before coming to Australia, the person does not meet this requirement;
- Be a resident of Italy. This is a question of fact. Italian citizenship is not sufficient, the person must be a resident of Italy immediately before visiting Australia;
- Visit Australia for a period not exceeding two years. This is a question of fact which can ordinarily be determined by reference to the period of time that the entry visa permits the person to be in Australia. The two year period refers to the total time of the visit. If during the period of teaching or after it has finished, an intention is formed to remain in Australia for a period that in total (with the earlier period) exceeds two years, the teaching income derived before the person's intention had changed will remain exempt. The exemption will not apply to any teaching income earned after the person's intention changed;
- The purpose of the visit is teaching at a university, college school or other educational institution. This is a question of fact that can be determined by reference to any employment contracts the person had entered prior to coming to or soon after arrival in Australia. Sightseeing and other tourist activities between school terms are not considered to impact upon the purpose of the visit;
- The remuneration received must be for the teaching activities. The purpose for which a person is remunerated is a question of fact. The job title that the person holds in the school is not relevant. The professional opinion of a school principal, deputy principal or a senior officer in the Education Department that an assistant teacher is remunerated for teaching in a school will generally be accepted as evidence; and
- The income must be 'subject to tax' in Italy. To obtain the benefit of the exemption from Australian tax, advice from Italian taxing authorities that the teaching income is subject to tax in Italy is required. If advice that the income is subject to tax in Italy cannot be obtained, the exemption from Australian tax is not available.

Example 1

6. Guiseppe completed his University and other examinations in 2000 and is qualified to teach in Italian schools. Guiseppe considered that it would enhance his career prospects if he gained teaching experience outside of Europe. In November 2000 Guiseppe entered into an employment contract with the Education Department of an Australian State for the 2001 and 2002 academic years. Under the terms of the contract he will be employed as an assistant teacher in a State school where he will assist the class teacher in the teaching of the Italian language to students. Guiseppe entered Australia on 4 January 2001. His entry visa requires that he leave Australia on or before 3 January 2003. Guiseppe has and will continue to see Australia as a tourist between school terms.

The Italian taxing authorities have advised Guiseppe that his Australian teaching salary is subject to tax in Italy.

The remuneration paid to Guiseppe for teaching in the State school is not subject to tax in Australia. The State school is not required to withhold an amount of tax from the remuneration.

Example 2

7. Maria is a teacher in Italy. Maria sought advice from the Australian Embassy of teaching opportunities in Australia. After being advised that her skills and qualifications were in demand in certain Australian States, Maria wrote to the Education Department of the State where she preferred to teach informing the Department that she would arrive in Australia in early December 2000 and would like to teach in a school for one academic year. Soon after her arrival, Maria was interviewed by the Department and accepted a teaching position for the 2001 academic year. Maria then toured parts of Australia and took up her teaching position in February 2001. Maria intends to return to Italy in February 2002.

The Italian taxing authorities have advised Maria that her Australian teaching salary is subject to tax in Italy.

The remuneration paid to Maria for teaching in the State school is not subject to tax in Australia. The State school is not required to withhold an amount of tax from the remuneration.

Example 3

8. Alfredo is a teacher in Italy. Alfredo arrived in Australia in October 2000 and commenced to tour Australia as a backpacker. Alfredo has earned income picking fruit whilst backpacking around Australia. In late January 2001, Alfredo met Guiseppe and Maria and then successfully applied for a teaching position in an Australian school. Alfredo intends to return to Italy in July 2002.

Alfredo did not enter Australia for the purpose of teaching. The remuneration paid to Alfredo for teaching in the State school is subject to tax in Australia. The State school is required to withhold an amount of tax from the remuneration.

Example 4

9. Ileana is a teacher in Italy. Ileana arrived in Australia on 25 January 2001 to undertake a teaching contract at an Australian school for two academic years. In August 2002, Ileana booked her return flight to Italy to depart Australia on 23 January 2003. On Christmas Day, Ileana is invited by Australian friends to join them on a 2 week bush walking trip in February 2003. Ileana extends her visa, completes the bush walking trip and departs Australia on 18 February 2003.

The Italian taxing authorities have advised Ileana that her Australian teaching salary is subject to tax in Italy.

The remuneration paid to Ileana for teaching in the Australian school is not subject to tax in Australia. The school is not required to withhold an amount of tax from the remuneration. On the evidence available, as Ileana did not form an intention to remain in Australia for a period exceeding two years until after completing her teaching contract, no part of her teaching income is taxable in Australia.

Commissioner of Taxation
3 October 2001

Previous draft:
Not previously issued in draft form

Related Rulings/Determinations:
TR 92/1; TR 92/20; TR 97/16; IT 2577

Subject references:
- double tax agreement
- double tax convention
- exempt income
- international tax
- teachers
- withholding taxes

Legislative references:
- ITAA 1953 20, Schedule 21
- TAA 1953 12-1(1), Schedule 1
- TAA 1953 Part IVAAA

ATO references:
NO T2001/010696
FOI I 1023321
ISSN: 1038-8982